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No. 94-1809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORP.,

Petitioners,

vs.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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PRELIMINARY STATEMENT

Respondents' brief is an extended detour around the question before the Court: "whether a federal court can withhold full faith and credit from a state court final judgment approving a class action settlement simply because the settlement released federal claims." Pet. for Cert. at i; *see also* Order granting certiorari. Unable to adduce any authority or policy supporting the Ninth Circuit's analysis, respondents advance "issues" regarding the severability of releases from judgments, the Supremacy Clause, the adequacy of class representation and due process, all of which respondents concede were not addressed by the Ninth Circuit and none of which is encompassed by the question accepted by the Court.

Respondents ask this Court to approve an arbitrary limitation on the established authority of a state court to enter a judgment approving a settlement of matters properly before the court, asserting that state courts are not competent to enter a judgment approving a class action settlement when the settlement includes a release of exclusively federal claims. Respondents concede, however, that a state court may approve the release of exclusively federal claims in an individual or derivative settlement. *See* Resp. Br. at 24 n.26. There is no principled basis for a different rule in the class action context, and any such distinction would undermine the policy of promoting the finality of class action settlements.

The linchpin of respondents' newly fashioned argument is that the Delaware judgment approving the class action settlement did not incorporate a release of claims. If the judgment did not incorporate a release, respondents argue, then the Ninth Circuit did not offend the Full Faith and Credit Act when it disregarded the state judgment. But respondents' assertion is demonstrably untrue. The judgment expressly released all claims arising out of Matsushita's tender offer for MCA, "including without limitation the claims asserted in the California Federal Actions." *See* J.A. 206.

The Full Faith and Credit Act presumptively applies to all judgments, and implied repeals of § 1738 -- which are disfavored and rare -- are not recognized absent a "manifest incompatibility" between § 1738 and the federal provision at issue. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 470 (1982). The argument that exclusive federal jurisdiction to adjudicate certain securities law issues is incompatible with granting full faith and credit to a state judgment entered on a consensual settlement controverts every decision of this Court construing the interaction of the Full Faith and Credit Act and subsequently enacted federal legislation. *See, e.g., Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 381 (1985); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984); *Allen v. McCurry*, 449 U.S. 90, 105 (1980); *see also Murphy v. Gallagher*, 761 F.2d 878, 885 (2d

Cir. 1985) (Exchange Act's "grant of exclusive jurisdiction . . . does not constitute a repeal [of §1738] by implication").

Respondents' assertion that the Supremacy Clause somehow "preempts" state courts from approving the release of "exclusively federal" claims in class action settlements is illogical. No coherent Supremacy Clause theory could preclude recognition of a judgment releasing securities law claims in class actions but allow such a release in individual or derivative actions. Thus, respondents' Supremacy Clause argument collapses of its own weight because respondents acknowledge (as did the Ninth Circuit) that state courts have the power to approve the settlement of exclusively federal claims in an individual or derivative action. *See* Resp. Br. at 20; Pet App. 37a-38a & n.32.

Finally, respondents challenge the Delaware judgment on the ground that inadequate representation of the class in the Delaware proceedings purportedly deprived the class of due process. But respondents concede the Ninth Circuit decision is not predicated on any due process issue. *See* Resp. Br. at 8. Moreover, adequacy of representation was an issue actually litigated and resolved in the Delaware courts, which found the representation of the class to be adequate. The Ninth Circuit properly did not revisit that finding. The class members here received notice and an opportunity to object or opt out. All but 19 of them in effect "opted in" by not objecting and by accepting the consideration paid in the settlement.

Respondents should not be permitted to sit out state court proceedings affecting the rights of the class and then sponsor in federal court an argument that could have been (and actually was) made in state court. Indeed, respondents' collateral attack on the competency and integrity of the Delaware courts only underscores the importance of § 1738 to the preservation of state-federal comity.

ARGUMENT

I. THE DELAWARE COURT RENDERED A JUDGMENT INCORPORATING A RELEASE OF THE CLAIMS NOW ASSERTED, AND THAT JUDGMENT IS ENTITLED TO FULL FAITH AND CREDIT

To avoid the consequence of § 1738, respondents now claim that they, and the Ninth Circuit, were "mistaken" in believing that the class release was incorporated in the Delaware judgment. Resp. Br. at 9. Respondents thus assert that the "Delaware judgment is irrelevant" to a § 1738 analysis because "[i]t is the release, not the judgment, that is presented to the federal court." Resp. Br. at 13, 10 (emphasis omitted). This invention is a dramatic reversal of their prior position, and the argument is without merit.

A. The Delaware Judgment Incorporates a Release of All Claims, Expressly Including the Federal Claims

The final judgment rendered by the Chancery Court states:

> All claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, any rules or regulations promulgated thereunder, or otherwise) ... [asserted] in connection with or that arise now or hereafter out of the ... Tender Offer ..., including without limitation *the claims asserted in the California Federal Actions ... are hereby compromised, settled, released and discharged with prejudice* by virtue of the proceedings herein and this Order and Final Judgment.

J.A. 205-06 (emphasis added).

The Ninth Circuit recognized that the Delaware judgment expressly provides for a release. Pet. App. 24a. No alternative interpretation of the plain words of the judgment is possible. Indeed, a class action settlement cannot be achieved without

court approval, as two United States Courts of Appeals have recognized. In *Nottingham Partners v. Trans-Lux Corp.*, the First Circuit enforced a state court judgment and release as written, holding that "*the release embedded in the Delaware judgment* was ... valid and enforceable as a matter of federal, as well as state, law." 925 F.2d 29, 34 (1st Cir. 1991) (emphasis added). Similarly, in *Grimes v. Vitalink Communications Corp.*, the Third Circuit observed:

> When the parties in a pending case negotiate a settlement, the resulting court order dismissing the case is a final judgment in that lawsuit. As a judgment, the settlement and release of claims is a contract that not only is agreed upon by the parties, but also is stamped with the imprimatur of the court with jurisdiction over the parties and the subject matter of the lawsuit.

17 F.3d 1553, 1557 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994); *see also* Pet. Br. at 23-25.[1]

B. Under the Full Faith and Credit Act, the Ninth Circuit Was Required to Enforce the Delaware Judgment

It is settled law that a federal court must determine the scope and effect of a state judgment and release on federal claims pending in federal court. *See, e.g., Marrese*, 470 U.S. at 381-82; *Grimes*, 17 F.3d at 1561-62; *Nottingham*, 925 F.2d at 33-34. This rule is a corollary of the principle that no court can conclusively determine the preclusive effect of its own judgment. *See Marrese*, 470 U.S. at 381-82. But the appropriate federal court review of the scope of a state court judgment requires the reviewing court to interpret the judgment and release in the manner it would be interpreted under state

---

[1] Respondents avoid reference to the First Circuit's decision in *Nottingham* and the Third Circuit's decision in *Grimes*, both of which held -- even in the context of *non*-opt out settlements -- that state courts may approve a class action settlement releasing exclusively federal claims.

law. *See, e.g., Marrese*, 470 U.S. at 380-81; *Kremer*, 456 U.S. at 466-67; *In re Nourbakhsh*, No. 94-55192, 1995 WL 569638, at *1 (9th Cir. Sept. 28, 1995).[2]

As a matter of comity, a state court rendering a judgment upon a class action settlement does not "dismiss" (or direct the federal court to dismiss) any claims that are governed by the settlement. The Delaware courts acknowledge that only a federal court may determine the effect of a judgment and release on claims pending in federal court. Respondents twist this acknowledgement to argue that the Delaware judgment is not entitled to full faith and credit. Respondents claim *Nottingham Partners v. Dana*, 564 A.2d 1089, 1104 (Del. 1989), holds that "[i]t is the *release, not the judgment*, that is presented to the federal courts." Resp. Br. at 10 (emphasis retained). *Dana* in fact holds:

> We conclude that the Court of Chancery's approval of the release, *as part of the Settlement and Order of Final Judgment*, does not in any way interfere with or limit the jurisdiction of the Massachusetts federal court.

Dana, 564 A.2d at 1105 (emphasis added). *Dana* thus recognizes that Delaware courts cannot dismiss, or direct the federal court to dismiss, exclusively federal claims released pursuant to a Delaware judgment. But that does not mean that the state court has not entered a judgment containing a release of federal claims. Obviously, it has. Simply stated, the federal court cannot treat the claims released as if they had not been released. It is a gross perversion of Delaware law for respondents to take Delaware's recognition -- grounded in *comity* -- that only the federal court may dismiss the released claims, and attempt to turn it into an end run around § 1738 and the Delaware judgment.[3]

[2] Respondents do not dispute that the Ninth Circuit failed to apply Delaware preclusion law. *See* Pet. Br. at 25-26. A state court-approved class action release bars prosecution of federal claims so long as the release satisfies three criteria: (1) it applies to the federal plaintiffs, (2) it encompasses the federal claims, and (3) it is legally enforceable. *Nottingham*, 925 F.2d at 32. As the First Circuit noted, once it is established that the federal plaintiffs were members of the Delaware class — a fact undisputed here — "[t]he rest follows inexorably." *Id.*

Respondents argue that a release incorporated in a judgment has no independent effect, because a judgment can have only issue or claim preclusive effect. Resp. Br. at 9, 14. However, a release incorporated in a judgment has preclusive effect independent of issue or claim preclusion, because the parties so intend and contract. *See Nottingham*, 925 F.2d at 34; *see also Cohen v. Resolution Trust Corp.*, 61 F.3d 725, 729 (9th Cir. 1995) ("[a] class action settlement, like the settlement of any other legal claim, is a 'private consensual agreement negotiated between the parties'") (citations omitted); *cf. Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501, 522 (1986) ("it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree").

Releases given in civil cases ordinarily release all claims available to the claimant, regardless of subject matter. Pet. App. 38a. As the Ninth Circuit recognized, a judgment incorporating a release of claims by an individual or corporation (as in the case of a derivative action settlement and release) has preclusive effect beyond issue or claim preclusion. *See*

[3] Respondents also argue that the Delaware judgment is not "final" because a federal court may determine its effect on claims pleaded in that court. All case law is to the contrary. *See, e.g., Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 593 (7th Cir. 1993) (judgment entered on state court class action settlement is final for preclusion purposes). An otherwise final state court judgment does not become non-final if a federal court subsequently undertakes to assess its scope and effect, any more than a state court's assessment of the scope of a federal court judgment could make that federal court judgment non-final. *See Playtex Family Prods., Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 684 n.2 (Del. Super. Ct. 1989) (judgment of trial court final for res judicata purposes even if appeal is taken), *op. entered*, 1990 WL 35299 (Del. Super. Ct. 1990).

Pet. App. 37a-38a & n.32. No logical distinction justifies giving different treatment to a class settlement that has satisfied the requirements of due process, as the First and Third Circuits have recognized. *Grimes*, 17 F.3d at 1563 ("the language of this broad release manifests an intent by the parties to settle all claims arising from the merger transaction"); *Nottingham*, 925 F.2d at 31-32 ("[i]t is beyond cavil that a suit can be barred by the earlier settlement of another suit *in either of two ways*: res judicata or release") (emphasis added); *see also Armstrong v. Board of Sch. Dirs.*, 616 F.2d 305, 315 (7th Cir. 1980) ("settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants").[4]

II. THE FULL FAITH AND CREDIT ACT REQUIRES FEDERAL COURTS TO GIVE THE DELAWARE JUDGMENT EFFECT UNDER DELAWARE LAW, AND THE EXCHANGE ACT DOES NOT CREATE AN EXCEPTION TO THAT MANDATE

Section 1738 presumptively applies to all judgments, and implied repeals are disfavored. *See Kremer*, 456 U.S. at 468. No exception to the Full Faith and Credit Act may be recognized unless the "concerns underlying a particular grant of

[4] As petitioners demonstrated in their opening brief, the Delaware action involved the same alleged wrongdoing that was at issue in the federal action. *See* Pet. Br. at 43 n.35. Indeed, the Ninth Circuit acknowledged that "the federal and state claims arose out of the same transaction." Pet. App. 34a. In seeking to avoid the clear preclusive effect of the Delaware judgment, the Ninth Circuit enunciated an unprecedented and unworkable inquiry into whether the federal and state claims shared an "identical factual predicate" (Pet. App. 33a), which requires the federal court to conduct an exceedingly detailed, *post hoc* hypothetical construction of how the state action would have been adjudicated had it not been settled. *See* Pet. Br. at 37-45.

exclusive jurisdiction justify a finding of an implied repeal of § 1738." *Marrese*, 470 U.S. at 386.[5]

As petitioners demonstrated in their opening brief, neither the plain language of the Exchange Act (or the Williams Act) nor its legislative history reveals a congressional intent to override § 1738 in the context of a state court judgment entered on a consensual settlement. But only such plain language or manifest intention would permit a federal court to deny preclusive effect to a state court judgment incorporating a release of Exchange Act claims. *See* Pet. Br. at 31-34; *Marrese*, 470 U.S. at 381 (the presumption against implied repeals of § 1738 applies even "in a lawsuit involving a claim within the exclusive jurisdiction of the federal courts").

The Ninth Circuit concluded that "the policy of finality of judgments is plainly outweighed" when a state court "exercise[s] judicial power" over exclusively federal claims. Pet. App. 28a n.25. But the policy of finality is strong. *See McCleskey v. Zant*, 499 U.S. 467, 493 (1991). It can be outweighed only if full faith and credit will interfere with a more compelling federal policy. Approval of a settlement, and *a fortiori* an opt-out settlement, is *not* an exercise of judicial power over federal claims and does not interfere with any federal policy. A court approving a settlement and release does not *adjudicate* the rights or liabilities of the parties and the federal interest in achieving uniformity in adjudications of exclusively federal claims is not implicated when a state court approves a settlement that includes the release of federal claims. *See Local No. 93*, 478 U.S. at 522-23; *Nottingham*, 925 F.2d at 33-34; *Dana*, 564 A.2d at 1104-05.[6] In short, *no*

[5] Respondents disparage this Court's full faith and credit jurisprudence as "awkward" because in their view Congress' enactment of the Full Faith and Credit Act in 1790 was not intended to "affect" federal claims. Resp. Br. at 28 n.31. This Court has expressly rejected respondents' position. *See, e.g.*, *Marrese*, 470 U.S. at 380-81.

[6] Respondents cite *Local No. 93* for the proposition that "a consent decree must spring from and serve to resolve a dispute within the court's subject matter jurisdiction." Resp. Br. at 20-21. *Local No. 93* in fact holds that "a

(Footnote continued)

federal interest is implicated by a consensual class release of exclusively federal claims, much less a federal interest sufficient to justify the wholesale nullification of a traditional function of the state judiciary.

A. The Delaware Judgment Approving a Settlement That Released "Exclusively Federal" Claims Did Not "Remove" an Exclusively Federal Claim

Respondents further attempt to circumvent § 1738 by arguing that the Delaware proceedings constituted a "removal" of an appeal from the Ninth Circuit to state court. Resp. Br. at 47. But a state court class settlement releasing federal claims "does not in any way interfere with or limit the jurisdiction" of a federal court. *Dana*, 564 A.2d at 1105; *see also Grimes*, 17 F.3d at 1563-64; *Nottingham*, 925 F.2d at 33-34.

Respondents' "removal" theory is a play on words. It conveys the erroneous impression that the Delaware settlement interfered with viable claims held by a properly constituted federal class. Significantly, at the time the settlement was negotiated and approved there was no pending federal claim and no federal class, because the district court had denied class certification and granted summary judgment dismissing all the claims. Moreover, the opt-out right assured every class member the right and the opportunity, by opting out, to pursue the federal claims described in the class notice.

Respondents' claim that they are not bound by the Delaware judgment ultimately is rooted in the assumption, accepted by the Ninth Circuit, that federal courts have authority

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federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." 478 U.S. at 525. This Court reasoned that because the consent decree was premised on the parties' consent, it could encompass matters outside the court's remedial powers. *Id.* Any statutory limitations placed on the court "simply do not apply when the [parties'] obligations are created by a consent decree." *Id.* at 523; *see also* Pet. Br. at 15-16 & n.14.

to override a state court judgment and the choices made by class members who decline to opt out of a settlement. This assumption would destroy the character of opt-out class action settlements, in which class members decide whether to participate in a proposed settlement or to preserve their claims by excluding themselves from the settlement class. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-11 (1985); *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 319, 336 (E.D. Pa.), *app. docketed*, No. 94-1927 (3d Cir. 1994). In this case, a federal class could be properly constituted only if a sufficiently numerous group of class members had elected to opt out of the settlement. Thus, if hundreds of members of the Delaware class had opted out, and the other requirements of Fed. R. Civ. P. 23 were satisfied, a federal class might properly have been constituted. But only 19 members elected to forego the settlement consideration and opt out. It was a subversion of the class action mechanism for the Ninth Circuit to order the certification of a federal class where the would-be members of that class had already elected to release their claims in exchange for consideration in the Delaware settlement.

B. Respondents' Supremacy Clause Analysis Is Irrelevant; The Issue Is the Relationship of Two Federal Statutes, Section 1738 and the Exchange Act

Instead of addressing the issue of implied repeal, respondents undertake a misdirected discussion of the Supremacy Clause. *See* Resp. Br. Point III. Apparently, the contention is that because an Exchange Act claim may only be adjudicated in federal court it can be resolved by settlement contract only under the auspices of a federal court. However, the Ninth Circuit decision could not be predicated on the Supremacy Clause. First, it is undisputed that a state court may approve the release of exclusively federal claims in individual and derivative actions. Pet. App. 38a. If the Supremacy Clause prohibits the release of exclusively federal claims in a state court class action, the Supremacy Clause would also prohibit it in those other contexts as well.

Second, respondents cannot reconcile their Supremacy Clause argument with the undisputed fact that Exchange Act claims may be *adjudicated* outside of federal court, including in arbitration, in state court when raised as affirmative defenses, and by foreign tribunals when principles of forum non conveniens counsel dismissal of a federal action. *See* Pet. Br. at 18-19 & n.17; *see also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 484 n.12 (1981) ("exclusive federal jurisdiction will not prevent a state court from deciding a federal question collaterally even if it would not have subject-matter jurisdiction over a case raising the question directly"). These exceptions to "exclusively federal" jurisdiction confirm what the legislative history of the Exchange Act and *Murphy v. Gallagher*, 761 F.2d at 885, demonstrate: there is no basis in the Exchange Act to find an implied repeal of § 1738 for a judgment entered on a settlement.[7]

Finally, this Court has repeatedly stated that the central inquiry under the Supremacy Clause is "to decide if a state rule conflicts with or otherwise 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the federal law." *Lividas v. Bradshaw*, 114 S. Ct. 2068, 2076 (1994) (quoting *Brown v. Hotel Employees*, 468 U.S. 491, 501 (1984)) (internal quotation marks and citation omitted in original). The only interests implicated by a con-

[7] Respondents cite no case law supporting their position. In *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964), this Court held only that a state court may not enjoin the prosecution of an action pending in federal court. Delaware courts consistently have rejected any provision of a class action settlement that would enjoin the prosecution of litigation pending in federal court. *See, e.g.*, *Dana*, 564 A.2d at 1104. Neither *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 352 n.12 (1980) (respondents cite only to the dissent, without attribution, *see* Resp. Br. at 49 n.69), nor *United States v. Fausto*, 484 U.S. 439, 455 (1988), involve the Supremacy Clause or the Full Faith and Credit Act. Respondents' reliance on *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819), in which this Court held that federal immunity from state taxation is "the unavoidable consequence of that supremacy which the constitution has declared," exemplifies the disjunction between respondents' case citations and their contentions about the Supremacy Clause.

sensual release are those of affording litigants an efficient mechanism for resolving disputes in one forum, relieving federal courts of unwarranted burdens, and promoting freedom of contract and finality. *See* Pet. Br. at 17, 45-49; *see also Marrese*, 470 U.S. at 385; *General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982); *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 191 n.5 (8th Cir. 1993).

III. THE ADEQUACY OF REPRESENTATION WAS ADJUDICATED BY THE DELAWARE COURTS IN PROCEEDINGS AT WHICH RESPONDENTS HAD A RIGHT TO BE HEARD, AND THAT DETERMINATION IS CONCLUSIVE

A. The Ninth Circuit Opinion Is Not Predicated Upon Any Due Process Issue

Respondents invite this Court to find constitutional infirmity in the Delaware proceedings based on alleged inadequate representation and judicial supervision. Resp. Br. at 34-45. As respondents concede, the Ninth Circuit's holding is *not* predicated on these fact-specific issues. Resp. Br. at 8. Accordingly, this Court should decline to address them. *See Peralta v. Heights Medical Ctr., Inc.*, 485 U.S. 80, 86 (1988) ("[w]e shall deal with the case as it came here and affirm or reverse based on the ground relied on below"); *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984) ("we do not ordinarily consider questions not specifically passed upon by the lower court").[8] In any event, respondents deliberately waived the right to raise a due process challenge in the state courts. *See Retired Chicago Police Ass'n*, 7 F.3d at 592 n.6

[8] Respondents' failure to object in Delaware to the state court's subject matter jurisdiction estopped them from raising that argument in the Ninth Circuit -- and therefore in this Court on certiorari to the Ninth Circuit. *See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 710 (1982). Like *amicus* C.L. Grimes, respondents would have the lower federal courts sit in review of state courts.

("To the extent plaintiffs are questioning whether the prior state court [settlement] proceeding met minimum due process requirements, we note that the state trial court allowed them to present their views at the settlement hearing, and the fairness of the settlement was upheld on the plaintiffs' state court appeal."); *Laskey v. International Union, United Auto., Aerospace & Agric. Implement Workers (UAW)*, 638 F.2d 954, 957 (6th Cir. 1981) ("[s]ince appellants had the opportunity to object to the legal representation at the prior settlement hearing . . . appellants are collaterally estopped from now asserting that the legal representation was not adequate"); *see also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 484 n.16 (1983) (noting the recognized "competence of state courts to adjudicate federal constitutional claims").

B. Respondents and Every Class Member Received Full Due Process

Adequacy of representation was litigated in the Delaware Chancery Court, which found the class representation adequate. J.A. 204-05. This finding was affirmed by the Delaware Supreme Court. Pet. App. 76a. As petitioners demonstrated in their opening brief, these findings are entitled to issue preclusive effect. *See* Pet. Br. at 23 n.20; *compare* Resp. Br. at 8 (incorrectly asserting that petitioners "reject[ed]" any reliance on issue preclusion).

There is no policy that would permit a collateral attack based on allegedly inadequate representation when, as here, the class members were afforded notice, and an opportunity to object or opt out, and when the issue of adequacy of representation was actually litigated in state court. *See Allen*, 449 U.S. at 104 ("There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all."); *cf. Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (collateral attack permitted where absent class members not afforded notice or

opportunity to be heard). Respondents cite no case to the contrary.

C. Adequacy of Representation Is a Matter of Judicial Determination, Reinforced by the Right to Opt Out

Class actions are a mechanism for a single, binding adjudication of multiple claimants' rights, while assuring due process to absent class members and repose to defendants. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("the class-action device saves . . . resources . . . by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23"); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550-51 (1974) ("the principal function of a class suit" is to avoid multiple suits by binding absentees). In a class action settlement, a court authorizes class representatives to enter into a settlement on behalf of the class, and the representatives thereafter submit the settlement to the court for approval at a fairness hearing. *See, e.g.*, Fed. R. Civ. P. 23(e); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 173-80 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981). Due process mandates that class members receive notice describing the effect of the settlement, be afforded an opportunity to object (*e.g.*, to the adequacy of the settlement and representation) and, in appropriate circumstances, be afforded the opportunity to opt out. If the court finds that requisite procedural protections have been met and the settlement is fair, the class members who do not opt out are bound. *See, e.g., Shutts*, 472 U.S. at 808; *General Tel.*, 457 U.S. at 160-61; *American Pipe & Constr.*, 414 U.S. at 550.

The Delaware settlement here complied with the procedure sanctioned by this Court. The proposed settlement described the claims to be released and the court authorized the representatives to represent the class in connection with that proposed settlement. J.A. 187-88, 198. The class members were informed that the settlement released all claims arising out of the Matsushita tender offer, specifically including the claims

asserted in the California federal actions. Pet. App. 93a-94a. They were given the opportunity to opt out and to object and were advised that their failure to object would forever bar them from raising objections in the Delaware proceeding or any other action. Pet. App. 96a-99a. At the fairness hearing, the Chancery Court considered the arguments of the objectors -- including the same arguments as to adequacy of representation made by respondents here -- and approved the settlement as fair. Pet. App. 67a-70a. That decision was affirmed on appeal by the Delaware Supreme Court. No review in this Court under 28 U.S.C. § 1257 was sought. Those class members who chose not to opt out -- including respondents here -- accepted and received the financial proceeds of the settlement respondents now disclaim.[9]

Shutts makes clear that a class member who is afforded an opportunity to opt out, but who fails to exercise that option, is deemed to have consented to the personal jurisdiction of the state court, and therefore will be bound by any judgment entered in the state court. 472 U.S. at 811-12. Reviving an argument rejected by this Court one decade ago, respondents assert that opt out rights are inconsequential. *See* Resp. Br. at 17-18 & n.16. ***But see Shutts***, 472 U.S. at 813 ("the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so"). *Shutts* recognizes that

[9] The holding of the Chancery Court and Delaware Supreme Court that representation was adequate is supported by the record in Delaware. *See* Pet. Br. at 40 n.31. Class counsel appeared before the Chancery Court and submitted a record of discovery taken in litigation and the negotiations between the parties. J.A. 174-77, 186. Respondents attack class counsel as inadequate, but never explain why Delaware class counsel would have any interest other than maximizing the class recovery. Finally, respondents cannot assail the level of detail in the Delaware record -- which the Delaware Supreme Court concluded was entirely adequate -- without "asserting [their] own failure to raise matters clearly within the scope of a prior proceeding." *Underwriters Nat'l Assurance Co.*, 455 U.S. at 710.

class members have the capacity to protect their own interests and are responsible for their own decisions. *See* Pet. Br. at 21-23; *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1378 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2707 (1994); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 200 (3d Cir. 1993); *Thompson*, 992 F.2d at 190 n.4; 7A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil 2d* § 1768, at 362-63 (1986).[10]

Finally, relying on *Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994), respondents contend that *under Delaware law* a class member's failure to opt out does not constitute effective consent to a settlement negotiated by a duly constituted class representative. Respondents' assertion that the settlement did not comport with *Delaware* law (Resp. Br. at 37) must fail because the determinations they challenge were affirmed by the final judgment of the *Delaware* Supreme Court. *See Wainright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the State's highest court with respect to state law are binding on the federal courts"); *Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 52 F.3d 913, 917 (11th Cir. 1995) ("'a state's highest court is the one true and final arbiter of state law'") (citation omitted).

In any event, respondents' misinterpretation of *Prezant* cannot be reconciled with *Shutts*. *See* Pet. Br. at 21-23. *Prezant* announced a Delaware rule requiring that, when

[10] Respondents suggest that it is unclear whether any Delaware class representative held federal claims. Resp. Br. at 36 n.45. The Ninth Circuit did not predicate its decision on this factually incorrect suggestion, however, and this Court should decline to address it. *See Peralta*, 485 U.S. at 86; *Capital Cities*, 467 U.S. at 697. In any event, the court-approved settlement notice rebuts this suggestion, as it expressly states that the settlement consideration would be paid *only* to members of the class whose shares were purchased in the tender offer or were cashed out or converted pursuant to the merger. *See* Pet. App. 93a. If a class is in *fact* adequately represented despite a potential conflict, due process is satisfied. *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992); *In re Chicken Antitrust Litig.*, 669 F.2d 228, 236-37 (5th Cir. 1982); *Reynolds v. National Football League*, 584 F.2d 280, 285-86 (8th Cir. 1978).

adequacy of class representation is challenged, the court must articulate its findings regarding the satisfaction of the Rule 23 criteria "in order to facilitate possible appellate review." 636 A.2d at 925. The Chancery Court here fully complied with these requirements. The objectors to the settlement argued that the class representation was inadequate because the class representatives colluded with defendants' counsel to "sell out" the federal claims. Pet. App. 70a. The Chancery Court opinion specifically considered and rejected this contention. *Id.* The Chancery Court also determined by order that the suit was properly maintained as a class action and that the named plaintiffs were appropriate representatives:

> it is hereby further determined that the plaintiffs in the Actions, as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class and that the maintenance of this action as a class action meets all the requirements of Rule 23(a) and (b)(3) of the Court of Chancery.

J.A. 204-05. The Delaware Supreme Court affirmed this ruling. Due process requires no more. The determination of adequate representation is a classic example of a finding entitled to preclusive effect under the Full Faith and Credit Act. *Grimes*, 17 F.3d at 1562; *Nottingham*, 925 F.2d at 32.

* * *

Class action settlements have enabled federal and state courts to oversee the resolution of increasingly complex litigations involving securities, asbestos, medical devices, herbicides, and pharmaceuticals.[11] Absent an effective class

[11] *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 738-39 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993); *In re Drexel Burnham Lambert*, 960 F.2d at 291-92; *In re A.H. Robins Co.*, 880 F.2d 709, 741 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *Georgine*, 157 F.R.D. at 338; *In re Silicone Gel Breast Implant Prod. Liab. Litig.*, No. 94-P-11558-S, 1994 WL 578353, at *1 (N.D. Ala. Sept. 1, 1994).

action mechanism that can finally and conclusively resolve claims of multiple litigants, such cases may exceed the capacity of our courts.[12] The Ninth Circuit's decision will proliferate class actions involving the same parties in multiple forums -- a disturbing result from the standpoint of judicial administration. *See* Pet. Br. at 49; *Evans v. Jeff D.*, 475 U.S. 717, 732, 736-37 (1986) (Rule 23 should not be interpreted to "reduc[e] the attractiveness of settlement," with the result of "forcing more cases to trial, unnecessarily burdening the judicial system, and disserving . . . litigants"). The Ninth Circuit's decision also derogates the broad and important authority that courts supervising class actions have historically exercised under Rule 23 and its state analogs. *See Shutts*, 472 U.S. at 810 (noting numerous ways in which "[t]he concern of the typical class-action rules for the absent plaintiffs is manifested").

Respondents' unjustified invocation of the Supremacy Clause and due process concerns reflects the profound distrust of state court judicial processes that underlies the Ninth Circuit's decision. This distrust collides with basic principles of federalism and "this Court's emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so." *Allen*, 449 U.S. at 105. Satisfying all the requirements of due process, the Delaware Chancery Court exercised the established authority of a state court to approve a settlement providing for the release of all claims arising out of the transaction before it. The Ninth Circuit abrogated this authority in a deeply flawed decision that cannot be upheld without

[12] *See In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 750 (E. & S.D.N.Y. 1991) ("[t]he large number of asbestos lawsuits pending throughout the country threatens to overwhelm the courts and deprive all litigants, in asbestos suits as well as other civil cases, of meaningful resolution of their claims"), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993); *In re "Bendectin" Prods. Liab. Litig.*, 102 F.R.D. 239, 240 n.3 (S.D. Ohio) (existing Bendectin docket alone would require 105 "Judge years" to try), *mandamus granted on other grounds*, 749 F.2d 300 (6th Cir. 1984).

reducing state judicial systems to secondary institutions and depriving parties of the much needed opportunity for global settlement of complex litigation. *See* Pet. Br. at 45-50; *cf. Wood v. Bartholomew*, No. 94-1419, 1995 WL 592508, at *4 (U.S. Oct. 10, 1995) (noting the need for federal courts to avoid upsetting "the proper delicate balance between the federal courts and the States").

CONCLUSION

For all of the foregoing reasons, and the reasons stated in petitioners' opening brief, the judgment of the Ninth Circuit Court of Appeals should be reversed. The case should be remanded with instructions to dismiss the complaints with prejudice as to those plaintiffs who failed to opt out of the Delaware settlement.

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Respectfully submitted,

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